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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

FILED/ACCEPTED

SEP 19 2007

Federal Communications Commission  
Office of the Secretary

In the Matter of )  
 )  
Petition to Establish Procedural )  
Requirements to Govern Proceedings for )  
Forbearance Under Section 10 of the )  
Communications Act of 1934, as Amended )  
\_\_\_\_\_ )

WC Docket No. 07- \_\_\_\_\_

**PETITION FOR PROCEDURAL RULES TO GOVERN  
THE CONDUCT OF FORBEARANCE PROCEEDINGS**

Brad Mutschelknaus  
Genevieve Morelli  
Thomas Cohen  
KELLEY DRYE & WARREN LLP  
3050 K Street NW  
Suite 400  
Washington, D.C. 20007  
(202) 342-8400  
*Counsel to Covad Communications Group,  
NuVox Communications, XO Communications,  
LLC, Cavalier Telephone Corp.*

William A. Haas  
Vice President & Deputy General Counsel  
MCLEODUSA TELECOMMUNICATIONS  
SERVICES, INC.  
1 Martha's Way  
Hiawatha, Iowa 52233  
Tel: 319-790-7295  
Fax: 319-790-7901

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## SUMMARY

The Commission should immediately adopt procedural rules to govern the conduct of forbearance proceedings initiated pursuant to Section 10(c) of the Communications Act of 1934, as amended. Doing so will ensure that all forbearance petitions, including those forbearance petitions currently pending before the Commission, are considered fairly and fully.

As part of the Telecommunications Act of 1996, Congress enacted Section 10, giving the Commission the authority to “forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service” pursuant to specific criteria. Section 10 is intended to facilitate the elimination of outdated and unnecessary regulations without legislative intervention. Yet, because of flaws inherent in the statute and shortcomings in the Commission’s implementation of the provision, Section 10 has become a magnet for controversy and has enabled unreasoned decision-making.

A major reason this provision is controversial is due to the statute itself. The forbearance provision gives the Commission a new and powerful tool with which to sweep away much of the Act. Chairman Martin has referred to the provision as “unusual” because of the expansive authority and discretion it grants to the Commission. Section 10 delegates to the Commission the authority to waive statutory provisions—a task normally left to Congress—and it does not expressly require the use of notice and comment rulemaking procedures. Moreover, Section 10 mandates that forbearance requests are deemed granted if the Commission fails to act by the statutory deadline, which potentially places the ability to dictate regulatory outcomes in the hands of petitioners. The provision thus creates a new and far different mechanism from the Act’s general processes for the regulation of telecommunications carriers and services. This unique mechanism enables unusual regulatory results.

The statute is not the only source of controversy. The Commission is faced with addressing numerous forbearance petitions each year, some of which raise critical issues. Unfortunately, thus far, the Commission has followed an *ad hoc* decision-making process with virtually no established procedural requirements. The Commission has adopted only one procedural rule for forbearance filings since Section 10 was enacted, and that requirement pertains to the minor matter of requiring requests for forbearance to be filed as separate petitions.

In the current unstructured environment, forbearance proceedings are often free-for-alls. It is not uncommon for petitioning parties to file incomplete or insufficient petitions that they amend later, sometimes well after initial comments and reply comments have been submitted. Petitioning parties routinely late-file empirical information that is needed to satisfy their burden of proof that forbearance is warranted. Important questions regarding access to and use of highly relevant confidential information frequently occur and are not resolved. Further, the Commission has failed to explain its position with respect to forbearance petitions that have been “deemed granted” by operation of law because the Commission has not acted prior to expiration of the statutory deadline.

One solution would be for Congress to step in and either address the statute’s flaws or repeal Section 10 in its entirety. Absent that, the Commission can and should act now to bring some order to the forbearance process and to facilitate reasoned decision-making. With forbearance petitions having become the regulatory tool of choice for refashioning (or eliminating) regulatory obligations, it is critical that the Commission provide much-needed structure to the forbearance process. The Petitioners urge the Commission, at a minimum, to adopt immediately the rules proposed herein to govern the procedural aspects by which it reviews forbearance petitions and determines whether they meet the requirements of the statute.

Specifically, the Petitioners urge the Commission to adopt the following rules to govern its consideration of forbearance petitions:

- A rule confirming that APA notice-and-comment rules apply to petitions for forbearance;
- A rule specifying that the forbearance petitioner has the burden of proof;
- Rules governing the format and content of forbearance petitions, including, without limitation, a complete-as-filed requirement and a requirement that the petitioner demonstrate that it has satisfied each and every component of the Section 10 test;
- Rules governing protective orders and *ex parte* filings;
- Rules encouraging state commission input; and
- Rules establishing time tables for filing.

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**PETITION FOR PROCEDURAL RULES TO GOVERN  
THE CONDUCT OF FORBEARANCE PROCEEDINGS**

Covad Communications Group, NuVox Communications, XO Communications, LLC, Cavalier Telephone Corp., and McLeodUSA Telecommunications Services, Inc. (collectively, "Petitioners"), through their undersigned counsel and pursuant to Section 553(b)(A) of the Administrative Procedure Act ("APA"),<sup>1</sup> respectfully request that the Commission adopt the procedural rules specified herein, to govern the conduct of forbearance proceedings initiated pursuant to Section 10(c) of the Communications Act of 1934, as amended.<sup>2</sup> In order to ensure that all forbearance petitions (including those forbearance petitions currently pending before the Commission) are considered fairly and fully, the Petitioners urge the Commission to promptly adopt these proposed procedural requirements to provide the

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<sup>1</sup> 5 U.S.C. § 553(b)(A). Section 553(b)(A) of the APA provides that "rules of agency organization, procedure, or practice" are exempt from the general notice and comment requirements of Section 553 and the Commission routinely has interpreted this provision to permit the adoption of procedural rules similar to the procedural rules proposed in this petition without the need to engage first in a notice and comment process. *See, e.g., Ranger v. Federal Communications Commission*, 294 F.2d 240, 243-44 (D.C. Cir. 1961); *Bachow Communications, Inc. v. Federal Communications Commission*, 237 F.3d 683, 685-86 (D.C. Cir. 2001). *See also Inova Alexandria Hospital v. Shalala*, 244 F.3d 342, 349-50 (4<sup>th</sup> Cir. 2001).

<sup>2</sup> 47 U.S.C. § 160(c).

telecommunications industry with guidance on the appropriate information to be submitted and the procedures to be followed in this critical area.<sup>3</sup>

## I. BACKGROUND

As part of the Telecommunications Act of 1996 ("1996 Act"), Congress enacted Section 10, giving the Commission the authority to "forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service" pursuant to specific criteria.<sup>4</sup> Section 10 is intended to facilitate the elimination of outdated and unnecessary regulations without legislative intervention. Yet, because of flaws inherent in the statute and shortcomings in the Commission's implementation of the provision, Section 10 has become a magnet for controversy. Commissioners repeatedly have expressed concern about the fairness of the Section 10 decision-making process.<sup>5</sup> Members of Congress have found the provision to be so flawed that they have sought to repeal key elements.<sup>6</sup> Other members have found the Commission's administration of Section 10 to be "inconsistent with . . . the objective of open, reviewable administrative proceedings."<sup>7</sup> Most recently, at the July 2007 Federal

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<sup>3</sup> The specific procedural rules the Petitioners urge the Commission to adopt are appended hereto as Attachment A.

<sup>4</sup> 47 U.S.C. § 160.

<sup>5</sup> See, e.g., *Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. §160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, Statement of Commissioner Michael Copps, WC Docket No. 04-440 (rel. Mar. 20, 2006); *Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. §160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, Statement of Commissioner Jonathan Adelstein, WC Docket No. 04-440 (rel. Mar. 20, 2006); *Fones4All Corp. Petition for Expedited Forbearance*, Concurring Statement of Commissioner Michael Copps, Memorandum Opinion and Order, 21 FCC Rcd 11125 (2006).

<sup>6</sup> See, e.g., Section 10(c) of H.R. 5252 as reported by the Senate Committee on Commerce on June 28, 2006, which repealed the "deemed granted" requirement of Section 10 and instead mandated that any Commission action to grant or deny a petition would require a majority vote.

<sup>7</sup> Letter from The Honorable Bart Stupak, Member, U.S. House of Representatives, to Kevin J. Martin, Chairman, Federal Communications Commission (Jul. 18, 2007), at 1.



Communications Commission Oversight Hearing by the House Telecommunications and the Internet Subcommittee, a large group of Representatives aired their concerns regarding the provision.<sup>8</sup>

As noted above, a major reason this provision is controversial is due to the statute itself. The forbearance provision gives the Commission a new and powerful tool with which to sweep away much of the Act. Chairman Martin has referred to the provision as “unusual” because of the expansive authority and discretion it grants to the Commission.<sup>9</sup> Section 10 delegates to the Commission the authority to waive statutory provisions—a task normally left to Congress—and it does not expressly require the use of notice and comment rulemaking procedures.<sup>10</sup> Moreover, Section 10 mandates that forbearance requests are deemed granted if the Commission fails to act by the statutory deadline, which potentially places the ability to dictate regulatory outcomes in the hands of petitioners. The provision thus creates a new and far different mechanism from the Act’s general processes for the regulation of telecommunications carriers and services. This unique mechanism enables unusual regulatory results. For example, the Commission may take years to fully consider and adopt new regulations pursuant to the notice and comment requirements of the APA, only to see a forbearance petition, subject to a statutory one-year deadline, filed the day the new regulations are adopted (which may be months before they become effective and certainly long before any reconsideration or judicial review is

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<sup>8</sup> See, e.g., Statement of The Honorable John D. Dingell, Chairman, House of Representatives Committee on Energy and Commerce at the Subcommittee on Telecommunications and the Internet hearing entitled “Oversight of the Federal Communications Commission -- Part II” (Jul. 24, 2007) *available at* [http://energycommerce.house.gov/Press\\_110/110st74.shtml](http://energycommerce.house.gov/Press_110/110st74.shtml).

<sup>9</sup> See Speech of Federal Communications Commission Chairman Kevin J. Martin to the 2006 American Bar Association Administrative Law Conference, Washington, D.C. (Oct. 26, 2006).

<sup>10</sup> See *id.*

completed). Further, the “deemed granted” aspect of the forbearance provision enables a mere delay in Commission action to result in the elimination of key statutory or regulatory provisions. Such consequences are well outside of the regulatory mainstream, fostering outcomes that are not based on sound decision-making. It is not surprising that Section 10 engenders so much controversy.

The statute is not the only source of controversy. The Commission is faced with addressing numerous forbearance petitions each year, some of which raise critical issues. Unfortunately, thus far the Commission has followed an *ad hoc* decision-making process with virtually no established procedural requirements. The Commission has adopted only one procedural rule for forbearance filings since Section 10 was enacted, and that requirement pertains to the minor matter of requiring requests for forbearance to be filed as separate petitions.<sup>11</sup> This stands in stark contrast to the detailed rules the Commission has established for other, similar types of proceedings, such as those adopted in 1998 to govern formal complaints.<sup>12</sup>

In the current unstructured environment, forbearance proceedings are often free-for-alls. It is not uncommon for petitioning parties to file incomplete or insufficient petitions that they amend later, sometimes well after initial comments and reply comments have been submitted.<sup>13</sup> Petitioning parties routinely late-file empirical information that is needed to satisfy

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<sup>11</sup> *Adoption of Section 1.53 of the Commission's Rules*, Memorandum Opinion and Order, 15 FCC Rcd 1140 (2000).

<sup>12</sup> *Implementation of the Telecommunications Act of 1996, Amendment of Rules governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers*, First Report and Order, 12 FCC Rcd 22497 (1997), Second Report and Order, 13 FCC Rcd 17018 (1998), Order on Reconsideration, 16 FCC Rcd 5681 (2001).

<sup>13</sup> See, e.g., Letter from Edward Shakin, Vice President, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 04-440 (filed Feb. 7, 2006) (“February 7 Ex Parte”); Letter from Frank S. Simone, Executive Director, AT&T, to Thomas J. Navin, Federal Communications Commission, WC Docket No. 06-125 (filed Aug. 31, 2007); Memorandum from Robert B. McKenna attached to Letter

their burden of proof that forbearance is warranted.<sup>14</sup> Important questions regarding access to and use of highly relevant confidential information frequently occur and are not resolved.<sup>15</sup> Further, the Commission has failed to explain its position with respect to forbearance petitions that have been “deemed granted” by operation of law because the Commission has not acted prior to expiration of the statutory deadline.<sup>16</sup>

One solution would be for Congress to step in and either address the statute’s flaws or repeal Section 10 in its entirety. Absent that, the Commission can and should act now to bring some order to the forbearance process and to facilitate reasoned decision-making. With forbearance petitions having become the regulatory tool of choice for refashioning (or eliminating) regulatory obligations, it is critical that the Commission provide much-needed structure to the forbearance process. The Petitioners urge the Commission, at a minimum, to adopt the rules proposed herein to govern the procedural aspects by which it reviews forbearance petitions and determines whether they meet the requirements of the statute.

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from Melissa Newman, Vice President, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-125 (filed Sept. 4, 2007).

<sup>14</sup> See, e.g., *Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas*, Reply Comments of Verizon, WC Docket No. 06-172 (filed Apr. 18, 2007) (“*Verizon Reply Comments*”), at Exhibit 3.

<sup>15</sup> See, e.g., *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Motion to Modify Protective Order, WC Docket No. 04-223 (filed Oct. 11, 2006); *Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas*, Motion to Compel Disclosure of Confidential Documents Pursuant to Protective Order, WC Docket No. 06-172 (filed Oct. 11, 2006).

<sup>16</sup> Specifically, the Commission has not indicated whether it eventually will issue an order explaining the rationale for a “deemed granted” petition or otherwise address issues regarding such petitions after they have been “deemed granted.” The question of how to address issues regarding “deemed granted” petitions is pending before the Commission. See *Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, Motion by Covad Communications Group, NuVox Communications, Inc., and XO Communications, LLC for Expedited Order on Verizon Petition for Forbearance, WC Docket 04-440 (filed July 25, 2007).

The Commission should act promptly to adopt these rules. There is good cause for the Commission to adopt these rules now without first conducting a formal rulemaking proceeding. First, there currently are at least 15 forbearance petitions pending before the Commission that involve fundamental provisions of the Act and the Commission's common carrier rules. The Commission therefore does not have the luxury of the time it would take to conduct a full-blown rulemaking docket before settling on procedural rules to govern forbearance proceedings. Further, there is precedent for adopting procedural requirements outside of a rulemaking docket. The Commission undertook such action in the Section 271 interLATA entry context when it adopted a series of Public Notices establishing – and refining – the procedural requirements that would apply to interLATA entry applications and public participation in interLATA entry dockets.<sup>17</sup> The Commission should follow the same course here and adopt the much-needed procedural rules detailed in this petition.<sup>18</sup>

## **II. IT IS ESSENTIAL THAT THE COMMISSION APPLY ORDER TO THE FORBEARANCE PROCESS**

Congress added Section 10 forbearance authority as part of the 1996 Act, which amended major sections of the Communications Act of 1934 and created additional provisions. Yet neither the Senate nor the House Committee Reports on this legislation nor the Conference Report accompanying the final bill provides much in the way of explanation about the provision

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<sup>17</sup> See *Procedures for Bell Operating Company Applications Under New Section 271 of the Communications Act*, Public Notice, FCC 96-469, 11 FCC Rcd 19708 (1996); *Revised Procedures for Bell Operating Company Applications Under Section 271 of the Communications Act*, Public Notice, FCC 97-330, 12 FCC Rcd 18590 (1997); *Updated Filing Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act*, Public Notice, DA-99-1994 (rel. Sept. 28, 1999); *Updated Filing Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act*, Public Notice, DA-01-734, 16 FCC Rcd 6923 (2001).

<sup>18</sup> Alternatively, the Commission should adopt the rules specified herein on a temporary basis pending the outcome of a rulemaking proceeding to establish permanent rules.

or how it should be implemented by the Commission.<sup>19</sup> These reports merely recite or rephrase the statutory language. Because Congress did not specify the procedures to be followed or elaborate upon the precise standards to be applied by the Commission, the Commission largely has been left on its own to fill in the blanks – and it has chosen to do so almost exclusively on an *ad hoc* basis. A “procedure-less” regulatory environment always is of concern because it threatens to undermine the integrity of the decision-making process. It becomes of even greater concern when a statute delegates to the agency a task Congress typically reserves for itself; *i.e.*, waiver of statutory requirements – many of which lie at the heart of the Act and its policies.

There are several aspects of the forbearance statute that are so fundamental to telecommunications policy-making and, at the same time, so fraught with uncertainty that they cry out for the Commission to step in and adopt rules. First, the forbearance statute established a specific legal standard and process which is at odds with the traditional Title II rulemaking process. The Commission, for instance, took many years to finalize highly-detailed rules to implement Section 251(c) of the Act that fully passed court muster. Before court review complete, however, the Commission was forced to act on a petition to forbear from enforcing the rules in a particular geographic market.<sup>20</sup> While the Commission has no authority to prohibit the filing of such petitions, it has sufficient authority under Section 10 to ensure that any grant of forbearance is in the public interest, which includes ensuring that its basic telecommunications policy-making processes (including those processes applicable to Section 251) are not

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<sup>19</sup> *Report of the Committee on Commerce, Science, and Transportation on S. 652*, S. Rep. No. 104-23 at 50 (1995); *Report from the Committee on Commerce on H.R. 1555*, H. Rep. 104-204, at 89 (1995); *Conference Report on S. 652*, S. Rep. 104-458, at 184-185 (1996).

<sup>20</sup> *See Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005) (“*Omaha Forbearance Order*”), *aff’d Qwest Corporation v. Federal Communications Commission*, Case No. 05-1450 (D.C. Cir. Mar. 23, 2007) (“*Qwest Omaha*”).

undermined. A Commission policy not to consider or grant petitions for forbearance in situations where judicial review on the subject matter is still pending would do much to address this crucial potential conflict and serve the public interest.

Second, forbearance petitions are not clearly rulemakings or adjudications that automatically fall under the procedural requirements of the APA and the extensive case law that has been developed to implement the APA. So far, the Commission has typically treated forbearance petitions consistent with the APA's notice-and-comment procedures and the *ex parte* rules that govern rulemaking dockets,<sup>21</sup> but there is no requirement that the Commission continue this practice. This is of concern because the Commission frequently stresses the *ad hoc* nature of forbearance petitions.<sup>22</sup> These ambiguities leave both petitioners and interested parties searching in vain for certainty regarding what the Commission will require for any particular petition. There is no legitimate reason for these questions to remain unanswered.

An additional critical characteristic of forbearance petitions is that a forbearance petition is deemed granted if the Commission does not reach a decision to deny the petition (in

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<sup>21</sup> See, e.g., *Wireline Competition Bureau Extends Comment Cycle on Qwest's Petition for Forbearance in the Omaha Metropolitan Statistical Area*, Public Notice, WC Docket No. 04-223 (rel. Jul. 30, 2004); *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area, Pleading Cycle Established for Comments on ACS's Petition for Forbearance in the Anchorage, Alaska Local Exchange Carrier Study Area*, Public Notice, WC Docket No. 05-281, DA 05-2709 (rel. Oct. 14, 2005); *Pleading Cycle Established for Comments on Verizon's Petitions for Forbearance in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas*, Public Notice, WC Docket No. 06-172, 21 FCC Rcd 10174 (2006).

<sup>22</sup> Indeed, several days ago the Commission issued a Public Notice establishing a 7-day comment cycle, with no provision for the filing of reply comments, in response to Qwest's broadband services forbearance petition. See *Pleading Cycle Established for Comments in Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) From Title II and Computer Inquiry Rules With Respect to Broadband Services*, Public Notice, WC Docket No. 06-125, DA 07-3923 (rel. Sept. 13, 2007).

whole or in part) within one year from the date the Commission receives it.<sup>23</sup> Forbearance petitions have been deemed granted on several occasions, at least twice with the concurrence of all Commissioners and once on a 2-2 vote.<sup>24</sup> Although Congress included this provision to ensure timely Commission action, it has created a host of unforeseen problems with the Commission's decision-making processes. For example, while late-filed information sometimes is a concern in normal notice-and-comment rulemaking proceedings, the Commission can remedy those concerns by extending the time to deliberate and act in those dockets. In contrast, in forbearance dockets, the Commission has no such flexibility and, depending upon when the late-filed data is submitted, there may not be sufficient time for interested parties and, indeed, the Commission itself, to review and rebut the information prior to expiration of the statutory deadline.<sup>25</sup> Further, there currently are no processes in place to govern reconsideration of deemed granted petitions or to require the Commission to issue a written order after a petition has been deemed granted to ensure its actions are consistent with the public interest or, at a

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<sup>23</sup> The Commission may extend the one year statutory deadline by 90 days. See 47 U.S.C. §160(c).

<sup>24</sup> See *Ameritech Request for Forbearance from the Application of Section 272 of the Communications Act to Previously Authorized Telecommunications Relay Services Granted Through Operation of Law*, Public Notice, CC Docket No. 96-149 (rel. May 13, 1998); *SWBT Request For Forbearance From the Application of Section 272 of the Communications Act to Previously Authorized Telecommunications Relay Services Granted Through Operation of Law*, Public Notice, CC Docket No. 96-149 (rel. June 4, 1998); *Verizon Telephone Companies' Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to their Broadband Services Is Granted by Operation of Law*, Public Notice, WC Docket No. 04-440 (rel. Mar. 20, 2006).

<sup>25</sup> For example, on the final day of the formal pleading cycle, Verizon for the first time submitted empirical data in support of its request for forbearance from Section 251(c)(3) loop and transport unbundling obligations. Soon thereafter, numerous carriers filed a motion to dismiss or, in the alternative, deny the Verizon petitions on the ground that it would be patently unfair and contrary to the integrity of the forbearance process for the Commission to take Verizon's late-filed data into account in making its forbearance determinations. *Motion to Dismiss or, In the Alternative, to Deny Petitions for Forbearance on the Basis of Late-Filed Data*, WC Docket No. 06-172 (filed May 22, 2007) ("*Motion to Dismiss – Late-Filed Data*"). The motion remains pending at the Commission.

minimum, to ensure that the scope of forbearance deemed granted can be understood. These are just some of the problems with the current *ad hoc* approach to forbearance petitions that threaten to undermine the integrity of the Commission's decision-making processes.

After passage of the 1996 Act, the Commission promptly used its new forbearance authority to resolve its long-standing efforts to de-tariff the provision of long distance services by non-dominant carriers.<sup>26</sup> Many entities then jumped on the bandwagon and began to file forbearance petitions – an average of approximately 12 forbearance petition have been filed each year since enactment of Section 10. In the early years, these petitions focused more on lesser regulatory requirements but, beginning several years ago, petitioners began to seek relief from the core provisions of the Act, particularly Sections 201, 202, 251, 254, and 271.<sup>27</sup> Because many of the forbearance petitions facing the Commission potentially have such fundamental and far-reaching effects, there is an increased need for rules to ensure the Commission's processes are thorough and fair. The following sections describe the Petitioners' proposed rules.

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<sup>26</sup> See *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934*, CC Docket No. 96-61, *Second Report and Order*, 11 FCC Rcd 20730 (1996); *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934*, *Order on Reconsideration*, 12 FCC 15014 (1997); *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934*, *Second Order on Reconsideration and Erratum*, 14 FCC Rcd 6004 (1999).

<sup>27</sup> See, e.g., *Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. §160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, WC Docket No. 04-440 (filed Dec. 20, 2004); *Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas*, WC Docket No. 06-172 (filed Sept. 6, 2006) ("Verizon 6-MSA Petition"); *Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Colorado, Minneapolis-St. Paul, Minnesota, Phoenix, Arizona, and Seattle, Washington Metropolitan Statistical Area*, WC Docket No. 07-97 (filed Apr. 27, 2007) ("Qwest 4-MSA Petition").



### **III. THE COMMISSION SHOULD ADOPT PROCEDURES TO FACILITATE THE REVIEW OF FORBEARANCE PETITIONS AND TO GIVE ALL PARTIES REASONABLE OPPORTUNITY TO PRESENT THEIR VIEWS**

The Commission should adopt procedural requirements to facilitate the review of and participation in Section 10 forbearance proceedings. Currently, in contrast to other similar Commission proceedings such as formal complaint proceedings, applications for review, and petitions for interLATA authority under Section 271 of the Act, no procedural requirements govern petitions filed under Section 10. As a result, petitioners routinely file incomplete or insufficient petitions, leaving commenters unable to fully respond, and the Commission unable to adequately review the petitioner's request for forbearance. Given the stringent timeframe within which the Commission must act on a petition, it is essential that there be a seamless process that facilitates review, analysis, and comment on forbearance petitions. Therefore, the Commission should commit to subjecting forbearance petitions to notice-and-comment rulemaking procedures, require all forbearance petitions to be complete-as-filed, and mandate petitioners to demonstrate how they satisfy each element of the Section 10 forbearance standard.

#### **A. The Commission Should Confirm That APA Notice-and-Comment Rules Apply to Petitions for Forbearance**

As a threshold matter, the Commission should adopt a policy of applying the APA's notice-and-comment procedures to all Section 10 forbearance proceedings. The APA rules govern the manner in which administrative agencies, including the Commission, propose and establish regulations. Under the APA rules, agencies are required to provide all interested persons with adequate notice of a proposed rule and a reasonable opportunity to comment.<sup>28</sup> The primary purposes of these rules is to ensure that agencies afford all parties with due process and

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<sup>28</sup> 5 U.S.C. § 553(c). Draft rules are appended as Attachment A.

to guarantee that agencies develop and implement well-defined, uniform standards in adjudication and rulemaking proceedings.<sup>29</sup>

In forbearance proceedings, it is essential that all parties be afforded due process, since grave harm could result from an unwarranted grant of forbearance. To date, the Commission's practice has been to provide interested parties with the opportunity to comment on a forbearance petition, but the Commission should institutionalize this practice to ensure that potentially-affected parties have a well-defined right to have their views taken into account. When the Commission grants a petitioner's request for forbearance, it is engaging in a process similar to a rulemaking. Although, with forbearance, the Commission is refraining from applying an existing rule to a carrier or class of carriers rather than adopting a new rule, frequently, parties that have not sought forbearance are affected by the Commission's grant of the forbearance petition to the same (or greater) extent than if the Commission had adopted a new rule. Moreover, providing all interested parties with a defined opportunity to comment will assist the Commission in its review of the forbearance petition by ensuring that the Commission has a robust record to consider in making its forbearance determinations.

**B. The Commission Should Specify That the Party Seeking Forbearance Has the Burden of Proof**

The Commission should specify that the petitioning party bears the burden of proof in a forbearance proceeding. Specifically, the Commission should make clear its policy that each petitioner fully demonstrate it has satisfied each of the substantive requirements of Section 10 with respect to each of the regulations or statutory provisions for which it seeks forbearance. Under Section 10, the petitioner must demonstrate that enforcement of the

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<sup>29</sup> *Final Report of the Attorney General's Committee on Administrative Procedure* (Senate Document No. 8, 77<sup>th</sup> Congress, First Session, 1941).

particular rule at issue: (1) is not necessary to ensure that the charges, practices, and classifications are just and reasonable and are not unjustly or unreasonably discriminatory; (2) is not necessary for the protection of consumers; and (3) is consistent with the public interest.<sup>30</sup> The petitioner also must demonstrate that forbearance will enhance competitive market conditions.<sup>31</sup> The Commission should specify that, in order to satisfy its burden of proof, the petitioning party must supply all of the information upon which it bases its position that these prerequisites to forbearance have been met. Moreover, as discussed below, the Commission should spell out that the petitioner must supply this analysis and data (including the methodologies underlying the data) with its petition.<sup>32</sup>

**C. A “Complete as Filed” Requirement Should Apply to All Forbearance Petitions**

The Commission should adopt a “complete-as-filed” policy for all petitions seeking forbearance under Section 10. Consistent with this policy, the petitioner would be required in its initial filing to submit all of the evidence upon which it would have the Commission rely in evaluating whether the statutory requirements of Section 10 have been met. The petitioning party would not be permitted to materially supplement its petition without restarting the statutory clock. In limited circumstances, however, the Commission would have the discretion to permit a petitioner to correct a non-material deficiency in its petition.

1. *A Complete-As-Filed Rule is Necessary to Provide All Interested Parties With a Full and Fair Opportunity to Comment on the Forbearance Petition*

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<sup>30</sup> 47 U.S.C. § 160(a)(1)-(3).

<sup>31</sup> 47 U.S.C. § 160(b).

<sup>32</sup> See, e.g., *Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, 14 FCC Rcd 19947 (1999) (noting that the petitioner must provide sufficient data to satisfy its forbearance request), *remanded on other grounds, AT&T Corp. v. FCC*, 263 F. 3rd 729 (D.C. Cir. 2001).

Requiring parties to file complete petitions would facilitate Commission review and would help ensure that all interested parties have a full and fair opportunity to present their views to the Commission. Indeed, the Commission has recognized the necessity and benefit of adopting a complete-as-filed (or similar) rule in other contexts. For example, a Bell Operating Company (“BOC”) seeking authority to provide in-region interLATA service under Section 271 was required to submit with its interLATA entry application “all of the factual evidence upon which [it] would have the Commission rely in making its findings.”<sup>33</sup> In adopting the complete-as-filed requirement in that context, the Commission explained that the rule provided all interested parties with a “fair opportunity” to comment on the subject petition.<sup>34</sup> The Commission also requires formal complaints to contain all information upon which the Commission could base its decision.<sup>35</sup> Indeed, the Enforcement Bureau rejects as defective all formal complaints that do not meet the up-front filing requirements and requires complainants to re-file such complaints after the defects have been cured. In formal complaint proceedings subject to specific statutory deadlines (*i.e.*, complaints brought under Section 271(d)(6)), the clock does not begin to run until a complaint has been shown to meet all applicable procedural requirements. The Commission has explained that application of a complete-as-filed standard to

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<sup>33</sup> *Updated Filing Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act*, Public Notice, 16 FCC Rcd 6923, 6925 (2001) (“March 23 Public Notice”).

<sup>34</sup> *See, e.g., Application by Verizon Virginia Inc., Verizon Long Distance Virginia, Inc., Verizon Enterprise Solutions Virginia Inc., Verizon Global Networks Inc., and Verizon Select Services of Virginia Inc., for Authorization to Provide In-Region InterLATA Services in Virginia*, Memorandum Opinion and Order, 17 FCC Rcd 21880, 21925, ¶ 78 (2002) (“Verizon Virginia Section 271 Order”).

<sup>35</sup> Formal complaints brought under Sections 208(b)(1) and 271(d)(6) are subject to statutory deadlines of five months and ninety days, respectively. Other types of formal complaints are not subject to statutory deadlines, but the Commission nonetheless applies a complete-as-filed standard to all formal complaints.

formal complaints allows the Commission “to quickly focus on essential activities and to resolve complaints.”<sup>36</sup>

Similarly, a complete-as-filed policy for forbearance petitions would help ensure that all interested parties have a full and fair opportunity to comment. Currently, petitioners too often fail to file necessary information to support their claim for forbearance with their petition and rely instead on materials submitted long after the comment cycle has ended or try their luck with no record supplementation given the time pressure and political environment at the time. A particularly egregious example of this behavior occurred in the Verizon broadband forbearance proceeding when Verizon filed a detailed letter significantly narrowing the forbearance it was seeking six weeks before the 15-month statutory period for addressing its petition was to expire.<sup>37</sup> Verizon engaged in similar behavior more recently when it waited until the last day of the formal pleading cycle on its consolidated petitions for forbearance from Section 251(c)(3) and various other common carrier obligations in six Metropolitan Statistical Areas (“MSAs”) before submitting the detailed market-specific data even approaching what would be necessary to conduct an appropriate forbearance analysis.<sup>38</sup>

By submitting no evidence with its forbearance petition, a petitioning party is gaming the entire forbearance process by manipulating the 12-month statutory clock and taking advantage of limited Commission resources. When a petitioning party files a forbearance petition that contains no evidence to meet its burden of proof, it is in effect filing a notice with the Commission that it wants forbearance at the end of a defined 12-month period but it will

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<sup>36</sup> *Implementation of the Telecommunications Act of 1996: Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers*, 12 FCC Rcd 22497, ¶¶ 2, 24 (1997) (“*Formal Complaint Rules Order*”).

<sup>37</sup> *See Verizon February 7<sup>th</sup> Ex Parte*.

<sup>38</sup> *See* n. 12, *supra*.

dictate when (or if) during that 12-month period supporting information will be made available and when Commission resources will be expended to address its request. The language and intent of Section 10 do not give a petitioning party this level of control over the forbearance process and the deployment of Commission resources. Consequently, petitioning parties should not be permitted to continue engaging in this gamesmanship and unilateral decision-making.

Additionally, as a result of this type of behavior by petitioners, interested parties often do not have the necessary information upon which to file comments and, therefore, are denied a full and fair opportunity to present their views to the Commission. Interested parties and the Commission are often forced to expend unnecessary resources to review and analyze information as petitioners keep moving the target. The envelope will continue to be pushed by petitioners absent appropriate structure and oversight by the Commission. Perhaps more importantly, the Commission is denied a complete record upon which to base its forbearance determinations on the merits, and Commission staff also is forced to chase a moving target. A complete-as-filed requirement would enable all parties and the Commission to focus from the start on the essential elements of the petitioner's request and the proof offered by the petitioner, which is critical given the short statutory timeframe in which the Commission must issue its decision.

The Commission should prohibit a petitioner from supplementing, updating, or otherwise materially modifying its forbearance petition and supporting documentation in any way without re-starting the 12-month statutory clock.<sup>39</sup> This is the same standard the

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<sup>39</sup> This rule is particularly appropriate where the Commission already has addressed forbearance from the particular section of the Act or the particular rule from which a petitioner is seeking forbearance. In those cases, the petitioner should be held accountable for taking such potentially precedential rulings into account in preparing its petition.

Commission adopted in addressing Section 271 applications<sup>40</sup> and for good reason: permitting a petitioner to amend or supplement its petition repeatedly in situations where it knew (or should have known) the essential elements of its “proof” only would encourage it to submit an incomplete application. Indeed, in the context of Section 271 applications, the Commission explained that it is “highly disruptive” to the process to have a record that is continually evolving.<sup>41</sup> The same is true in Section 10 forbearance proceedings; the constant additions and modifications to the record are highly disruptive for the Commission and all involved parties.

The Commission, however, would retain authority if good causes exists to waive the complete-as-filed rule in the forbearance context. Section 1.3 of the Commission’s rules permits the Commission, on its own motion, to waive rules for good cause.<sup>42</sup> Indeed, in proceedings for in-region interLATA authority, the Commission recognized that Section 1.3 provides it with the necessary authority to waive the complete-as-filed rule if circumstances warrant.<sup>43</sup> Therefore, should good cause exist, the Commission would have the discretion to permit a petitioner seeking forbearance to supplement its petition.

## 2. *The Commission Should Specify Forbearance Petition Filing Requirements*

In implementing the complete-as-filed requirement, the Commission should specify certain items that are necessary to make a *prima facie* showing that forbearance may be warranted. First, the Commission should require all legal arguments to be contained in the body

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<sup>40</sup> *March 23 Public Notice*, 16 FCC Rcd at 6925.

<sup>41</sup> *Id.* at 6926.

<sup>42</sup> 47 C.F.R. § 1.3.

<sup>43</sup> *Verizon Virginia Section 271 Order*, 17 FCC Rcd at 21925, ¶ 79 (stating, “[w]e conclude that the special circumstances before us here warrant a deviation from the general application review period...we find that the interests our procedural requirements are designed to protect are not affected by our consideration of these late-filed rate reductions. We also find that consideration of the rate reductions will serve the public interest.”).

of the petition. The Commission should prohibit parties from burying legal arguments in affidavits, declarations, or attachments, and should make it clear that it will strike any legal arguments that are not included in the petition itself. Requiring all legal arguments to be included in the petition is consistent with the requirements adopted in proceedings involving applications for in-region interLATA authority under Section 271 and good cause exists for extending this rule to forbearance petitions. Like Section 271 applications, Section 10 petitions frequently are voluminous, and given the abbreviated timeframes available to respond to a petition, it is essential that the petitioner include all relevant information—including all relevant legal arguments—in the petition itself.

The Commission also should require the petitioner to submit an affidavit by an officer or director of the company affirming that all statements contained in the petition and all supporting materials are true and correct. Such a certification ensures that the petitioner has taken all reasonable efforts to verify the accuracy of all relevant documentation in support of its petition.

**D. A Petitioner Should be Required to Demonstrate How it Satisfies Each and Every Component of the Section 10 Test**

The Commission should require each petitioner to separately demonstrate that it satisfies each component of the Section 10 standard. Under Section 10, a petitioner must demonstrate the following three enumerated criteria:

- Enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
- Enforcement of such regulation or provision is not necessary for the protection of consumers; and



- Forbearance from applying such provision or regulation is consistent with the public interest.<sup>44</sup>

The petitioner also must demonstrate that forbearance from enforcing the regulation at issue will promote competitive market conditions.<sup>45</sup>

Requiring a petitioner to separately demonstrate how it has satisfied each component of the forbearance standard is consistent with the Commission's pleading requirements in other contexts. For example, in the formal complaint context, the complainant is required to file a detailed explanation of how the defendant has violated the Act and is prohibited from filing cursory notice-type pleadings.<sup>46</sup> In adopting this requirement, the Commission emphasized that thorough filings are necessary to achieve its goal of resolving complaints expeditiously.<sup>47</sup> In the present case, the Commission is obligated by statute to resolve forbearance petitions quickly. It is therefore essential that petitioners submit detailed petitions.

In past practice, petitioners have failed to address each element of the Section 10 standard individually, instead generally asserting that the forbearance criteria are satisfied with respect to all of the regulations and statutory provisions from which they are seeking forbearance. Without sufficient detail from the petitioner regarding how it satisfies each element of the standard for each of the regulations or provisions from which it seeks forbearance, interested parties are unable to respond fully to the petitioner's claims and are forced to presume what the petitioner's arguments are and respond accordingly. It also places an unnecessary burden on the Commission to extrapolate a petitioner's logic. Requiring a petitioning party to identify how it satisfies each aspect of the Section 10 forbearance test in its petition will facilitate

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<sup>44</sup> 47 U.S.C. § 160(a)(1)-(3).

<sup>45</sup> 47 U.S.C. § 160(b).

<sup>46</sup> *See Formal Complaint Order*, 11 FCC Rcd at 22534, ¶ 82.

<sup>47</sup> *Id.*